

The Telephone Authority believes that the increased use of VoIP systems, in lieu of traditional telecommunications, raises significant concerns which the Commission properly addresses at this time. While the Telephone Authority supports new technology, it is concerned that increased use of IP-enabled services will adversely affect the ability of Indian tribes and tribal entities to provide telecommunications services to their members and non-members within reservation boundaries. More broadly, the Telephone Authority is concerned about the effect that the Proposed Rule may have on tribal self-determination and economic self-sufficiency. The Commission should recognize that Indian tribes and tribal entities are distinct from other telecommunications services providers, and the Commission has a special relationship with tribes and their governmental entities which it does not have with other providers. The Proposed Rule should acknowledge those differences, as well as the Commission's obligation to protect its special relationship with tribes and tribal entities.

As discussed in further detail below, the Telephone Authority is particularly concerned that the combination of increased reliance on IP-enabled services and broadband power line systems will reduce the Telephone Authority's revenue to the detriment of the Cheyenne River Sioux Tribe ("Tribe") and the Cheyenne River Indian Reservation ("Reservation") community. In this regard, the Telephone Authority incorporates herein the *Comments of the Cheyenne River Sioux Tribe Telephone Authority, In the Matter of Inquiry Regarding Carrier Current Systems, including Broadband over Power Line Systems*, ET Dkt. No. 03-104, *Amendment of Part 15 regarding new requirements and measurement guidelines for Access Broadband over Power Line Systems*, ET Dkt. No. 04-37 (Apr. 29, 2004) ("Broadband Comments").

Based upon the Telephone Authority's concerns and comments set forth in the Broadband Comments as well as in the instant comments regarding IP-enabled services, the Telephone Authority urges the Commission to undertake government-to-government consultation with the Tribe, the Telephone Authority and any other tribes which request such consultation, regarding the impact of this new technology on Indian tribes and their tribal entities. *See* Section III, *infra*.

II. ECONOMIC IMPACT

At the outset, it is critical that the Commission understand and acknowledge that tribal telecommunications services providers are unlike other providers. The Tribe established the Telephone Authority in 1958 as a governmental entity of the Tribe for the purpose of providing telephone service within the Reservation, pursuant to tribal Ordinance 24 (Sept. 10, 1974). The Telephone Authority is thus vested with the same attributes of the Tribe, including sovereign immunity. *See In the Matter of the Cheyenne River Sioux Tribe Tel. Auth.*, CC Dkt. No. 98-6, FCC 02-222 at 3, 5 n.20 (Aug. 21, 2002); *Cheyenne River Sioux Tribe Tel. Auth. v. S.D. Pub. Util. Comm'n*, 595 N.W.2d 604, 606, 607 (S.D. 1999).

Since 1974, the Telephone Authority -- the oldest tribal telecommunications services provider -- has served nearly the entire Reservation, spanning a distance of 95 miles. The Telephone Authority provides high quality telephone service with fiber optic long distance service, computerized billing service, cellular telephone services, equal access conversion, free fire bar service, emergency 911 services, and 100 percent one-party service in buried cable. The Telephone Authority is constantly upgrading its plants, facilities and equipment. The Telephone Authority also is an internet service provider for the Reservation operating as the corporate entity, Lakota Technologies, Inc. In this capacity, the Telephone Authority has made affordable internet

access available to all households and businesses lying within the five exchanges it owns and operates.²

With 50 employees, the Telephone Authority also is the largest employer on the Reservation, which has an overall unemployment rate of 80%. Moreover, the Telephone Authority is a significant source of funding for the Tribe's essential governmental services. All the directors who serve on the Telephone Authority's Board of Directors are members of the Tribe and live on the Reservation. The directors, therefore, have a personal interest in the type and quality of telecommunications service provided on the Reservation. As a member of the Reservation community, the Telephone Authority has strong incentive to ensure that all telephone customers on the Reservation receive state-of-the-art service. Clearly, the Telephone Authority is a vital component of the Reservation economy, in addition to providing consumers with state-of-the-art services.

According to the Commission, IP-enabled services will allow customers to "customize the services they use" and "choose these services from an unprecedented range of service providers and platforms." Proposed Rule at 2. While the Telephone Authority does not dispute the apparent advantages of IP-enabled services, it is concerned that the widespread use of such systems on the Reservation could cause a significant decrease in revenue for the Telephone Authority, with the resulting ripple effect upon Reservation unemployment levels and tribal revenues for the provision of essential governmental services. The Telephone Authority's concern

²The Telephone Authority owns and operates the Dupree, Eagle Butte, South Dupree, Lapland, and Isabel telephone exchanges.

is heightened in light of the increased use of broadband over power lines.³ If the Telephone Authority loses a certain level of revenue, it may be unable to provide necessary telecommunications services, including emergency 911 services, to tribal members and Reservation residents.

Due to the high start-up costs for the provision of telecommunications services, especially in Indian country which tends to be rural, unchecked competition may not be in the public interest. To the contrary, unlimited competition for an underserved area may have the effect of prohibiting any of the providers from realizing a profit from serving that area since they split only modest returns due to the limited customer base. The expansion of IP-enabled services, especially in conjunction with the utilization of power lines for broadband services, may increase competition on the Reservation; however, the Telephone Authority is not confident that this is in the best interests of the Reservation community. Given the limited customer base of the Reservation, providers may not be able to achieve the economies of scale necessary to remain in business. As described above, consumers living within the Reservation clearly benefit from the service that the Telephone Authority provides them. Moreover, Indian reservations are different in character than rural areas located outside of Indian lands due to tribal sovereignty concerns. Unlike other rural

³On March 17, 2004, the Commission issued a notice of proposed rulemaking seeking to amend part 15 of the Commission's rules to adopt guidelines for a new type of carrier current system that provides access to broadband services using electric utility companies' power lines. Broadband Power Line Systems Proposed Rule, 69 Fed. Reg. 12,612 (proposed Mar. 17, 2004) (to be codified at 47 C.F.R. pt. 15). The Commission stated that broadband power line systems "could play an important role in providing additional competition in the offering of broadband services to the American home and consumers, and in bringing Internet and high-speed broadband access to rural and underserved areas." Broadband Proposed Rule at 2. The Telephone Authority submitted its Broadband Comments addressing the broadband over power lines issue on April 29, 2004.

telecommunication providers, tribal telecommunication providers enhance tribal sovereignty by contributing financially to tribal governments and helping to sustain reservation economies.

For these reasons, the Telephone Authority requests that the Commission undertake government-to-government consultation with the Tribe, the Telephone Authority and any other Indian tribes which are concerned about the impacts of these new technologies. *See* Section III, *infra*.

III. CONSULTATION

Based upon the Telephone Authority's concern that the combined effect of the increased utilization of broadband power line systems and IP-enabled services will hinder its ability to provide high quality, state-of-the-art telecommunications services, the Telephone Authority urges the Commission to conduct government-to-government consultations with those tribes that have telecommunications interests and request such consultation.

As executive departments and agencies undertake activities affecting Native American tribal rights or trust resources, such activities should be implemented in a knowledgeable, sensitive manner respectful of tribal sovereignty. . . . [It is] our responsibility to ensure that the Federal Government operates within a government-to-government relationship with federally recognized Native American tribes. Government-to-Government Relations with Native American Tribal Governments, 59 Fed. Reg. 22,951, 22,952 (Apr. 29, 1994). In order to carry out this policy, "[t]he United States continues to work with Indian tribes on a government-to-government basis to address issues concerning Indian tribal self-government, trust resources, and Indian tribal treaty and other rights." Exec. Order No. 13,084, 63 Fed. Reg. 27,655 (May 14, 1998). Therefore, all agencies, including independent agencies, *id.* § 6 ("[i]ndependent regulatory agencies are encouraged to comply with the provisions of this order."), should adhere to "principles of respect for Indian tribal self-government and sovereignty, for tribal treaty and other rights, and for responsibilities that arise

from the unique legal relationship between the Federal Government and Indian tribal governments.” *Id.* § 2.⁴

In light of this clear policy, the Commission should consult with the Tribe and the Telephone Authority in order to determine the consequences of increased use of broadband power line systems and IP-enabled services on the Tribe and the Reservation community. Government-to-government consultation in this instance is critical to determine the effects of new technologies on Indian tribes. Indeed, the tribal determination of the provision of telecommunications and IP-enabled services within a reservation is a critical aspect of tribal self-governance and self-determination, a policy which the federal government has embraced:

It is hereby declared to be the policy of Congress . . . to help develop and utilize Indian resources, both physical and human, to a point where the Indians will fully exercise responsibility for the utilization and management of their own resources and where they will enjoy a standard of living from their own productive efforts comparable to that enjoyed by non-Indians in neighboring communities.

Indian Financing Act of 1974, 25 U.S.C. § 1451; *see also* Indian Reorganization Act of 1934, 25 U.S.C. §§ 461, 462, 463, 464, 465, 466-70, 471, 472, 473, 474, 475, 476-78, 479 (“IRA”); Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. §§ 450-450n; Indian Health Care Improvement Act, 25 U.S.C. §§ 1601(a), 1602; *accord Memorandum Opinion and Order, In the Matter of AB Fillins*, 12 F.C.C.R. 11,755, 11,759 (1997). Congress has acknowledged that, “Indians will never surrender their desire to control their relationships both among themselves and with the non-Indian governments, organizations, and persons.” 25 U.S.C.

⁴The Telephone Authority, on several occasions, has urged the Commission to consult on a government-to-government basis with Indian tribes on matters which affect them. *See, e.g., Comments of the Cheyenne River Sioux Tribe Tel. Auth., Smith Bagley, Inc. Petition for Designation as an Eligible Telecomms. Carrier Under 47 U.S.C. § 214(e)(6)*, FCC 97-419 at 3-4 (July 27, 1999); *Comments of the Cheyenne River Sioux Tribe Tel. Auth., In the Matter of W. Wireless Corp. Petition for Designation as an Eligible Telecomms. Carrier and for Related Waivers to Provide Universal Serv. to Crow Reservation, Montana* at 1-3 (Oct. 28, 1999).

§ 2501(3); *accord* 25 U.S.C. § 2502(e) (Congressional commitment to “Federal relations with the Indian Nations.”).

Consultation regarding the provision of IP-enabled services as an alternative to traditional telecommunications services must be individualized. Only by consulting with individual tribal governments on a case-by-case basis can the Commission as a practical matter determine whether an Indian reservation is underserved, and also determine the manner in which that tribal government may wish to address the question of availability of telecommunications services within Indian tribal territory. That way, the Commission may ascertain the degree of service and the manner in which the tribe wishes to address any deficiency in telecommunications services. Government-to-government consultation should be the central aspect in the Commission’s examination of the use of IP-enabled services as an alternative to traditional telecommunications services.

Significantly, the Commission should not promulgate a rule that works to the detriment of the federal policy promoting tribal self-determination and economic self-sufficiency. As stated above, the combined effect of the broadband power line systems and IP-enabled services may be to deprive the Telephone Authority of its telecommunications business altogether. The Telephone Authority does not own or operate the powerlines on the Reservation. If the Commission permits the provision of broadband service over powerlines, that will deprive the Telephone Authority of revenue it would have otherwise received from the provision of data transmission services using telecommunications technology. Further, the substitution of VoIP for regular telephone service subscription will likely deprive the Telephone Authority of a significant customer base. If those individuals who choose to use VoIP instead of telephone service receive their internet services via

broadband transmitted over powerlines, that will eliminate the need for the Telephone Authority completely. The end result will be to transfer the business from the Telephone Authority to the power company which, in the case of the Cheyenne River Indian Reservation, is not a tribally owned and operated entity.⁵ The ripple effect on the Reservation economy and governmental budget could be devastating. Certainly, such a result would not be consistent with the federal policy promoting tribal self-determination and economic self-sufficiency.

IV. JURISDICTIONAL CONSIDERATIONS.

While the Proposed Rule discusses jurisdictional consideration of IP-enabled services, it focuses solely on state versus federal jurisdiction. The Proposed Rule suggests that IP-enabled services are interstate services subject to federal jurisdiction. Proposed Rule at 28-29. Among other jurisdictional issues, the Proposed Rule seeks comment “on the appropriate basis or bases for asserting federal jurisdiction over . . . the various categories of IP-enabled services,” and, “whether, and on what grounds, one or more classes of IP-enabled service should be deemed subject to *exclusive* federal jurisdiction with regard to traditional common carrier regulation.” *Id.* at 29.

While federal versus state authority is an important issue in regulation of IP-enabled services, it is important to note that Indian tribes are sovereign entities which may have jurisdiction over IP-enabled services in Indian country. In general, jurisdiction within Indian reservation boundaries is a complex issue that depends in large measure upon the nature of the regulated activity, as well as the state’s and tribe’s interests in the regulated activity. *See Montana v. United States*, 450 U.S. 544, 566 (1981). The issue of jurisdiction is further complicated by the

⁵In the case of the Cheyenne River Indian Reservation, electric power is provided by Moreau-Grand Electric Cooperative, Inc., a state-regulated cooperative.

checkerboard land ownership on many reservations, including the Cheyenne River Indian Reservation, in which trust land is interspersed with fee land frequently owned by non-members and non-Indians.

The sovereign powers of an Indian tribe do not generally extend to regulation of activities of non-members of the tribe. *Montana*, 450 U.S. at 565. Nevertheless,

Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands. A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements. A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.

Id. at 565-66 (citations omitted).⁶ If at least one of the two *Montana* exceptions exists, the tribal government properly has jurisdiction over the providers of IP-enabled services and, thus, may presumably regulate such services within Indian country.

⁶In *Strate v. A-1 Contractors*, 520 U.S. 438, 454 (1997), the Supreme Court held that a tribal court lacked jurisdiction over a civil action between non-members arising out of a motor vehicle accident on a state highway which traversed the reservation. The Supreme Court determined that the highway was equivalent to non-Indian fee land for the purpose of assessing the limits of the tribe's jurisdiction. *Id.* However, it is not clear how much weight the status of land as trust or non-trust should be given in the application of the *Montana* analysis following *Nevada v. Hicks*, 533 U.S. 353 (2001). In *Hicks*, the Supreme Court held:

The ownership status of land . . . is only one factor to consider in determining whether regulation of the activities of nonmembers is “necessary to protect tribal self-government or to control internal relations.” It may sometimes be a dispositive factor. . . . But the existence of tribal ownership is not alone enough to support regulatory jurisdiction over nonmembers.

Id. at 360.

Accordingly, Indian tribes may have authority over companies who enter into consensual relationships with them.⁷ Furthermore, the provision of utility services, including IP-enabled services, arguably satisfies the second *Montana* exception because the provision of those services as an alternative to traditional telecommunications services directly affects the political integrity, economic security, and the health and welfare of a tribe. *See Montana*, 450 U.S. at 566. Certainly, the provision of 911 emergency services goes to the issue of the Tribe's health and welfare.⁸ In any event, the complexity of the issue of jurisdiction over the IP-enabled service providers emphasizes the need for government-to-government consultation between the Commission and the Indian tribes and their governmental entities which may be affected by the Proposed Rule.

⁷In *Big Horn County Electric Cooperative, Inc. v. Adams*, 219 F.3d 944, 951 (9th Cir. 2000), the Ninth Circuit held that an electric company's voluntary provision of electrical services on a reservation created a consensual relationship. However, the presence of the first *Montana* exception did not give the tribe unlimited jurisdiction over the electric company, but rather, limited its jurisdiction to "the activities of nonmembers who enter [into] consensual relationships." *Id.* (quoting *Montana*, 450 U.S. at 565) (alteration in original). Because the ad valorem tax on the value of the electric company's property imposed by the tribe was not a tax of the *activities* of a non-member, the Ninth Circuit held that the tax did not come within *Montana*'s first exception. *Big Horn*, 219 F.3d at 951.

Similarly, the court in *Reservation Telephone Cooperative v. Henry*, 278 F. Supp. 2d 1015, 1023 (D. N.D. Aug. 26, 2003), held that the rights-of-way obtained by telecommunications service providers to offer services on the reservation did not equal a consensual relationship with the tribe. Federal law required the providers to obtain the rights-of-way and provided a statutory mechanism for their acquisition. *Id.* However, neither of these holdings prohibit tribes from seeking other means of establishing a consensual relationship with non-Indian IP-enabled service providers.

⁸The courts in both *Big Horn* and *Henry* held that the provision of telecommunications services does not implicate the political integrity, the economic security, or the health or welfare of the tribe and, therefore, does not come within the second *Montana* exception to state jurisdiction. *Big Horn*, 219 F.3d at 951; *Henry*, 278 F. Supp. 2d at 1024. Neither court, however, considered the provision of 911 emergency services.

V. PUBLIC SAFETY AND DISABILITY ACCESS.

The Proposed Rule “seek[s] comment on the public safety and disability access implications of IP technology and services.” Proposed Rule at 35. As noted in the Proposed Rule, “the Commission has statutory authority . . . to determine what entities should be subject to the Commission’s 911 and E911 rules.” *Id.* at 36. The Telephone Authority believes the Commission should exercise its regulatory authority to require emergency calling and other public safety capabilities for VoIP and other IP-enabled services. While regulatory mandates could potentially slow technical and market development, the Telephone Authority believes that it is far more important to ensure that VoIP and other IP-enabled services “promote the safety of life and property, and provide individuals with disabilities with equivalent access to such services in the public interest.” *Id.* at 35. At minimum, both 911 and enhanced 911 (“E911”) requirements should apply to VoIP and other IP-enabled services, as they do to wireline and wireless telecommunication providers including the Telephone Authority.⁹ Furthermore, if IP-enabled services can enhance the capabilities of public safety answering points and first responders by providing information which cannot be conveyed by non-IP-enabled services, thereby promoting public safety, the Commission should exercise its authority to require IP-enabled service providers to meet the higher standards. *See id.* at 37.

The Telephone Authority also supports the Commission’s initiation of a rulemaking proceeding to address law enforcement matters such as lawfully permitted wiretaps which may be affected by IP-enabled services. *See id.* at 35 n.158. The Telephone Authority is routinely asked

⁹Phase II implementation of E911, which requires a covered wireless carrier to transmit a 911 caller’s location information to the appropriate public safety answering point, is currently being phased in across the county. Proposed Rule at 36 n.160.

to perform wiretaps and traces by tribal and other law enforcement officials. With increased use of IP-enabled services in place of traditional telecommunications, tribal law enforcement's capabilities will be significantly hindered if they do not have the capability to perform taps and traces on calls made through IP-enabled services.

VI. CARRIER COMPENSATION AND RURAL CONSIDERATIONS.

The Commission requests comment "on the extent to which access charges should apply to VoIP or other IP-enabled services." *Id.* at 42 (footnote omitted). In this respect, the Telephone Authority agrees with the Commission that

any service provider that sends traffic to the [public switched telephone network ("PSTN")] should be subject to . . . compensation obligations, irrespective of whether the traffic originates on the PSTN, on an IP network, or on a cable network [T]he cost of the PSTN should be borne equitably among those that use it in similar ways.

Id. Because VoIP and other IP-enabled services will presumably send traffic to the PSTN, the Telephone Authority believes that providers of IP-enabled services should be required to pay access charges regardless of how they are classified. *See id.*

Furthermore, the Commission should require providers of IP-enabled services to pay access charges in order to support services in rural areas. The Telephone Authority's service area is, in addition to being an Indian reservation, rural in character. As this Commission has recognized, rural carriers face unique challenges:

Because rural carriers generally have higher operating and equipment costs, which are attributable to lower subscriber density, small exchanges, and a lack of economies of scale, the Commission has historically not adopted one-size-fits-all policies that might impede rather than support the provision of affordable service by rural carriers.

Id. at 51-52. Rural carriers such as the Telephone Authority greatly depend upon access charges. The migration to IP-enabled services will decrease the access charges which the Telephone Authority receives from wireline and wireless telephone calls. Therefore, the Telephone Authority believes that, irrespective of how the Commission ultimately characterizes this new technology, the providers of IP-enabled services should be required to pay their fair share of access charges.

VII. UNIVERSAL SERVICE.

In the Proposed Rule at 43-46, the Commission seeks comment on “how the regulatory classification of IP-enabled services, including VoIP, would affect the Commission’s ability to fund universal service,” and more specifically, “on how potential migration to IP-enabled services will affect [the Commission’s] statutory obligations to support and advance universal service.” *Id.* at 43, 45. The Telephone Authority believes that a migration to IP-enabled services could potentially “lessen eligible telecommunications carriers’ (ETCs) ability to maintain existing circuit-switched networks and deploy new packet-switched networks.” *Id.* at 45. Assuming ETCs do not enter the market of providing IP-enabled services, their revenue will decrease as their customers switch to VoIP or other IP-enabled services. In addition to a loss of revenue, increased use of IP-enabled services will cause the cost of providing services on the PSTN to rise. The combined effect of this reduction in revenue and increase in costs could potentially diminish ETCs’ capability to maintain current circuit-switched networks and establish new packet-switched networks.

Although IP-enabled services are becoming increasingly popular, it is unlikely that they can or will provide universal service to the same extent that traditional telecommunication

providers have. IP-enabled services may provide consumers with an additional choice in telecommunications services, however, there is no indication that they will increase access for those who do not have any telecommunications services at present. Moreover, IP-enabled services require either broadband or narrowband internet access,¹⁰ which many consumers in the Telephone Authority's service area choose not to have. As some customers (though not all) switch to IP-enabled services, the Telephone Authority's revenue will decrease and costs will rise. Consequently, the Telephone Authority's ability to provide services to those who chose not to switch to IP-enabled services will diminish and its contribution to universal service may disappear.

Since migration to IP-enabled services will diminish ETCs' revenue without necessarily providing additional service, such migration is likely to affect the Commission's statutory obligations to support and advance universal service. For this reason, the Telephone Authority believes that the Commission should reexamine its universal service paradigm if consumers increasingly utilize IP-enabled services. *See id.* at 46.

VIII. CONCLUSION.

Without question, the Telephone Authority supports state-of-the-art telecommunications services in Indian country such as IP-enabled services including VoIP. However, the Telephone Authority is concerned about the potential effect this technology and others will have on its ability to provide quality telecommunications services to tribal members and the Reservation community. Therefore, the Commission should consult with the Tribe and the Telephone Authority on a

¹⁰IP-enabled services are typically provided over broadband facilities, although they could also work on narrowband facilities. Proposed Rule at 3 n.2. As IP-enabled services become more sophisticated and popular, they will almost exclusively be provided on broadband platforms. *Id.*

government-to-government basis regarding the potential effects of IP-enabled services and broadband power line systems on the Tribe, the Telephone Authority and Reservation community. Only by engaging in such government-to-government consultation can the Tribe, the Telephone Authority and the Commission fully understand and prepare for the consequences of these new technologies on Indian tribes and tribal economies.

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